INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and other authorities involved	2
Statement	3
Discussion	7

CITATIONS

Cases:	
R. J. Reynolds Tobacco Co. v. *Helvering*, 97 F. (2d) 302, pending on petition for certiorari, No. 328, October term, 1938	7, 8
E. R. Squibb & Sons v. *Helvering*, 98 F. (2d) 69	7, 8
Gypsy Oil Co. v. *Escoe*, 275 U.S. 498	7
Statutes:	
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 605 (U. S. C., Title 26, Sec. 1691)	9
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 22	9
Miscellaneous:	
T. D. 4430, XIII–1 Cumulative Bulletin 36	10
Treasury Regulations 77, Art. 66	10

101340—38

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 385

FIRST CHEROLD CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16) is a memorandum opinion and therefore not officially reported. The opinion of the Circuit Court of Appeals (R. 33) is reported in 97 F. (2d) 22.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 26, 1938. (R. 36.) A petition for rehearing was denied on June 28, 1938. (R. 47.) A "Supplemental Petition for Rehear-

ing" was filed on July 14, 1938, which, as far as we are able to ascertain, has not yet been acted upon. The petition for certiorari was filed on September 27, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After the taxpayer, a corporation, had originally issued its stock, it made purchases and sales of its own stock, buying and selling for cash, without any intention or authority to increase or decrease its authorized capital. During 1933, the taxable year, the taxpayer derived a gain from such trading in its own stock. However, Article 66 of Treasury Regulations 77, provided in part that a corporation realizes no gain or loss from the purchase or sale of its own stock. Subsequently the applicable regulation was amended by Treasury Decision 4430 to provide that where a corporation deals in its own stock as it might in the shares of another corporation the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. The question presented is whether this case is properly governed by the rule set forth in the original or in the amended regulation.

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved will be found in the Appendix, *infra*, pp. 9–12.

STATEMENT

The facts, as stipulated, for the most part, and as found by the Board of Tax Appeals (R. 16–20) are substantially as follows:

The taxpayer is a Delaware corporation organized April 8, 1930, for the purpose of speculating in listed stocks. In the course of its business the taxpayer never owned stocks that were not listed on the Exchange. During the taxable year the taxpayer had authorized capital stock of 10,000 shares of which 5,748 were issued at approximately $100 per share. (R. 16–17.)

Mr. Gerald M. Loeb, a partner of E. F. Hutton & Company, of New York City, managed the taxpayer from the time of its organization through the taxable year. The original subscribers for the taxpayer's stock were some 60 or 70 friends of Mr. Loeb, who were promised at the time the stock was issued that the corporation would repurchase the stock if they wished to sell it, and if financial conditions permitted. The stock of the taxpayer was not listed on any stock exchange. (R. 17.)

The taxpayer made the following purchases and sales of its own stock during the period from 1931 to 1933, inclusive (R. 18–19):

Date	Purchases			Date	Sales		
	Shs.	Price	Cost		Shs.	Price	Proceeds
1931				1931			
Feb. 16	80	114	$9,855.60	Feb. 20	25	114⅝	$2,888.38
Mar. 30	100	111¼	11,125.00	Feb. 24	35	116	4,049.85
Apr. 14	50	111¼	5,562.50	Mar. 31	50	113	5,635.00
Apr. 20	100 Cash	110	11,025.00	Apr. 2	10	113	1,126.60
May 6	50	108	5,412.50	Apr. 16	90	111¾	10,031.40
Aug. 4	100	109¾	10,100.00		210 shs.		
Aug. 26	50	96	4,810.00				
Aug. 27	50	96	4,810.00				
Sept. 21	136	96	13,063.20				
Sept. 30	50	98	4,910.00				
Oct. 6	250 Cash	98	24,550.00				
Oct. 6	150 Cash	98	14,730.00				
Oct. 8	150 Cash	98	14,730.00				
Oct. 21	50	98	4,910.00				
Oct. 26	10	98	983.00				
Nov. 10	250 Cash	100	25,062.50				
Nov. 13	50	100	5,012.50				
Dec. 10	25 Cash	103¾	2,600.00				
Dec. 11	5	102	513.00				
	1,686 shs.						

Total purchases ..... 1,686 shares
Less total sales ..... 210 "

Shs. held at end of 1931 ..... 1,476 "

1932				1932			
Feb. 20	145	105¼	$15, 439.00	Jan. 12	10	108¾	$1, 084.10
May 11	24	105¾	2, 532.00	Dec. 7	200	113.98	22, 726.00
May 19	450	102	44, 012.50				
June 21	10	108	1, 083.00				
July 8	10	108	1, 083.00				
	640 shs.						

Total Purchases	640 shares
Less Total Sales	210 "
	430 "
Balance at end of 1931	1, 476 "
Plus purchases in 1932	640 "
	2, 116 "
Less sales in 1932	210 "
Balance at end of 1932	1, 906 "

Date	Purchases			Date	Sales		
	Shs.	Price	Cost		Shs.	Price	Proceeds
1933				1933			
				Feb. 23	20	117	$2, 333.20
				May 3	5	132	656.55
				May 5	25	133⅛	3, 329.00
				May 8	50	133⅛	6, 658.00
				May 9	40	134	5, 346.00
				May 11	25	131⅜	3, 286.38
				May 15	25	131	3, 266.50
				May 22	40	129	5, 146.40
				June 9	10	142	1, 416.10
				June 9	50	142	7, 083.00
				June 9	25	144	3, 591.50
				July 12	50	146	7, 283.00
				Aug. 31	65	146	9, 467.90
				Sept. 1	3	146⅝	436.98
				Sept. 6	2	145⅓	287.83
				Sept. 18	10	150¾	1, 498.60
				Sept. 26	100	145	14, 466.00
				Oct. 25	4	147	584.64
				Nov. 21	86	146	12, 526.76
				Dec. 4	17	143	2, 425.22
				Dec. 19	10	150⅓	1, 501.10
					662 Shs. sold.		

Balance at end of 1932	1, 906 shares
Less Sales in 1933	662 "
Balance at end of 1933	1, 244 "

The taxpayer, during 1933, sold 662 shares of its own capital stock at a total selling price of $92,593.05. The Commissioner, in determining the deficiencies asserted, determined that these 662 shares of stock sold by the taxpayer during 1933 for $92,593.05 were acquired by the taxpayer during 1931 at a cost of $64,648.40 and accordingly added to income the difference of $27,944.65. The taxpayer admits that it did purchase 662 shares of its own capital stock in 1931 and sold the same number of shares in 1933 for the sums above mentioned. The purchases and sales of the stock were made on the basis of liquidating value, plus or minus a marginal difference to take care of inaccuracies. (R. 20.)

When the taxpayer purchased the shares of its own stock they were charged to an account designated "Treasury Stock" in the amounts paid therefor, and they were carried as such on the liability side as a deduction from issued capital. Upon subsequent sales of shares of the stock this account was credited with the cost of the respective shares sold, and the excess of the amount received upon the sale of shares over the price at which an equal number of shares were purchased was credited to an account designated "Surplus From Sale of Treasury Stock." No adjustment was made in the outstanding capital stock by reason of such purchases and sales, the matter being handled entirely by an increase or decrease in the treasury stock. Purchases of stock or securities other than shares of

its own capital stock were carried in separate accounts designated "Speculative Long Position in Market" and "Investment Long Position in Market." (R. 20.)

The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals, and held that the gain derived by the taxpayer from trading in its own stock during the taxable year represented taxable income in accordance with the provisions of the amended regulation. (R. 33–35.)

DISCUSSION

Inasmuch as, in the Government's view, the cause is properly before the Court at this time,[1] and the decision is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *R. J. Reynolds Tobacco Co.* v. *Commissioner*, 97 F. (2d) 302, now pending on the Government's petition for

[1] The record does not disclose the fact, but on July 14, 1938, after its original petition for rehearing was denied, the taxpayer filed what was styled a "Supplemental petition for Rehearing," advising the court below of the decision in *E. R. Squibb & Sons* v. *Helvering*, 98 F. (2d) 69 (C. C. A. 2d). This supplemental petition was not filed within thirty days after entry of final judgment, as required by Rule 27 of the Rules of the Circuit Court of Appeals for the Third Circuit. So far as we are able to ascertain, this petition has not yet been acted upon. Under the rule of *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, the three-month period for filing a petition for certiorari began to run from the date of denial of the original petition, and was not suspended by the filing of the untimely "supplemental" petition, unless perhaps the latter is actually entertained by the lower court.

certiorari, No. 328, October Term, 1938, and with the decision of the Circuit Court of Appeals for the Second Circuit in *E. R. Squibb & Sons* v. *Helvering*, 98 F. (2d) 69,[2] the Government does not oppose the granting of the writ.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

OCTOBER 1938.

---

[2] In this case the *taxpayer* filed a petition for rehearing, objecting to the decision of the court with respect to a matter not considered by either of the other circuit courts of appeals, namely that the taxpayer realized gain upon the sale of its treasury stock to the extent that the sales price exceeded the value thereof at the time of sale. On October 10, 1938, upon the suggestion of counsel for the taxpayer and with the acquiescence of counsel for the Government, the court decided to withhold action on the taxpayer's petition for rehearing, pending the action of this Court on the *R. J. Reynolds Co.* and *First Chrold Corp.* petitions.

APPENDIX

STATUTE AND OTHER AUTHORITIES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 605. RETROACTIVE REGULATIONS.

Section 1108 (a) of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1108. (a) In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision, made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect." (U. S. C., Title 26, Sec. 1691.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

Treasury Regulations 77, relating to the Revenue Act of 1932:

> ART. 66. *Sale by corporation of its capital stock.*—The proceeds from the original sale by a corporation of its shares of capital stock, whether such proceeds are in excess of or less than the par value of the stock issued, constitutes the capital of the company. If the stock is sold at a premium, the premium is not income. Likewise, if the stock is sold at a discount, the amount of the discount is not a loss deductible from gross income. If, for the purpose of enabling a corporation to secure working capital or for any other purpose, the shareholders donate or return to the corporation to be resold by it certain shares of stock of the company previously issued to them, or if the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase or sale of its own stock. (See article 176.)

Treasury Decision 4430, approved May 2, 1934, XIII–1 Cumulative Bulletin 36:

> ARTICLE 66: Sale by corporation of its capital stock XIII–20–6792 T. D. 4430
> (Also Section 23 (i), Article 176.)
>
> INCOME TAX.
>
> Acquisition or disposition by a corporation of its own capital stock.
>
> Articles 543 and 563, Regulations 65 and 69, and articles 66 and 176, Regulations 74 and 77, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Articles 543 of Regulations 65, approved October 6, 1924, and Regulations 69, approved August 28, 1926, and articles 66 of Regulations 74, approved February 15, 1929, and Regulations 77, approved February 10, 1933, are hereby amended to read as follows:

Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where

permitted by the provisions of applicable statutes.

Articles 563 of Regulations 65, approved October 6, 1924, and Regulations 69, approved August 28, 1926, are hereby amended by striking out the first and second sentences thereof, by substituting the words "a corporation" in place of the second word in the third sentences of those articles, and by adding the following sentence to those articles:

As to the acquisition or disposition by a corporation of its own capital stock, see article 543.

Article 176 of Regulations 74, approved February 15, 1929, is hereby amended by omitting the first and second sentences thereof, by substituting the words "a corporation" in place of the second word in the third sentence of this article, and by adding the following sentence to this article:

As to the acquisition or disposition by a corporation of its own capital stock, see article 66.

Article 176 of Regulations 77, approved February 10, 1933, is hereby amended by omitting the first and second sentences thereof, and by adding the following sentence to this article:

As to the acquisition or disposition by a corporation of its own capital stock, see article 66.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 2, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1934